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February 14, 2003

Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TWB-204
Washington, D.C. 20554

Re: UNE Triennial Review, CC Docket Nos. 01-338, 96-98, 98-147
Ex Parte Notification

Dear Ms. Dortch:

Yesterday, the undersigned, along with Steve Augustino of Kelley Drye & Warren LLP, representing SNiP LiNK, and Ed Cadieux of NuVox, met with Jordan Goldstein, Senior Legal Advisor to Commissioner Copps, to discuss the parties' positions on various issues raised in the above-captioned dockets. The discussion focused on EELs, transport and broadband.

With respect to EELs, the parties outlined the benefits of the joint SBC/NuVox/Cbeyond/SNiP LiNK EELs proposal.[1] Notably, the parties underscored that the proposed streamlined safe harbor criteria for smaller carriers creates a test that applies on a LATA-wide, as opposed to circuit specific, basis.[2] The parties noted that this feature of the streamlined test eliminated the measurement and monitoring burdens associated with demonstrating compliance with existing safe harbor options 2 and 3. The parties also emphasized that the streamlined test eliminated potential policing concerns that the ILECs have created based on each of the current safe harbors. Significantly, the parties explained that the

[1] Cbeyond Communications, NuVox, Inc., SNiP LiNK, LLC, SBC Telecommunications, Inc. , 2/7/03 Joint *Ex Parte* Letter, CC Docket No. 01-338.

[2] The parties underscored that the one-to-twenty-four interconnection trunk to EEL ratio in the test is not designed to measure and monitor local and non-local traffic on an EEL circuit-by-EEL circuit basis, but instead provides an indicator that the CLEC is exchanging a significant amount of local traffic with the ILEC in the LATA, in part through the use of EELs.

streamlined test would allow them to serve and grow with their customers by not only permitting provision of an integrated T1 product over an EEL but also by allowing the use of such EELs to provide a full T1 of broadband Internet access over EELs (provided that traffic patterns LATA wide generate sufficient interconnection trunk needs and that the particular EEL falls within the ratio incorporated into the test to ensure compliance with the significant local use standard). The parties emphasized that they expect their integrated T1 service customers to continue to generate the need for additional T1 services, including broadband Internet access, and that they would be substantially impaired if they were unable to continue to use EELs for that purpose.

Critically, the parties also underscored that the streamlined safe harbors require ILECs to provide EELs to smaller CLECs in an audit-free environment. Under the streamlined test, an ILEC must provision first and then file a complaint at the FCC, if it disputes a CLEC's compliance with any of the three criteria. For NuVox in particular, this aspect of the proposal is especially important.[3] To expedite such complaint proceedings, of which there should be relatively few, the proposal clearly states that a CLEC has an obligation to produce appropriate documentation demonstrating compliance with the three criteria.

The parties also responded to an inquiry about Qwest's latest proposed test (Qwest, Feb. 6, 2003 *Ex Parte*) and noted that like all others proposed by Qwest, the latest test was more onerous than the current Safe Harbors and, in particular, that the 51% measurement requirement was without any legal or policy justification. The parties also objected to nearly every aspect of Qwest's proposal as being one that requires that local voice traffic be carried on every circuit, despite Qwest's having no corresponding obligation of its own and the fact that the current safe harbor option 1 contains no such requirement.[4] In a separate meeting with the Bureau, the parties had more time to expand their criticism of Qwest's proposal and also opposed Qwest's suggested "Class 5" switch requirement[5] as well as the proposed treatment of an ISP as an IXC, as it would prevent the use of EELs for data or Internet access.[6] In addition, the parties expressed significant concerns that Qwest's proposals were at odds with common engineering and provisioning processes and that they would present the ILECs with ample opportunity to use the disconnect to avoid provisioning of EELs in the future. The parties also noted that Qwest was simply wrong with respect to Internet access traffic. Under the current safe harbors, Internet

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[3] NuVox also underscored the need for Commission action to put a prompt and decisive end to BellSouth's EEL audit abuses.

[4] The parties have consistently advocated and, now Qwest appears to agree, that co-mingling restrictions must be eliminated. Notably, there are no co-mingling restrictions included in the streamlined safe harbors incorporated into the joint proposal.

[5] The parties do not oppose a requirement that an EEL cannot be connected to a Class4-only long distance voice switch.

[6] The treatment of an ISP as IXC also would unfairly penalize those CLECs that have made the necessary investments to become an ISP, as well as a CLEC.

access can and does satisfy the local use criteria.[7] Finally, the parties objected to Qwest's proposal to expand ILEC audit rights and impose more measurement, recording and policing burdens on CLECs in doing so. The parties indicated that Qwest's proposal would only give ILECs greater ability to use audits as a means of discouraging legitimate use of EELs.

The parties also underscored that the "status quo" was unacceptable because the status quo essentially amounts to continued ILEC expansion and abuse of the current safe harbors. The parties noted that ILECs had recently begun to seek to apply the current safe harbor restrictions to "new EELs", although the current state of the law is that they apply only to conversions. BellSouth's extension of co-mingling restrictions to stand-alone UNEs also was highlighted. And, especially significant to NuVox, the parties noted that BellSouth's abuse of its limited audit rights could not continue unchecked.

With respect to transport issues, the parties urged the Commission to make a national impairment finding with respect to DS1 transport. In support of this position, the parties continued to emphasizing that nobody wholesales or self-provisions DS1 transport. The parties also continued to express their opposition to any transport impairment test that may result in the delisting of transport as a result of alternatives available only in economic theory. Imaginary alternatives simply do not suffice in the real world. Accordingly, the parties oppose the so-called "inference test" which, as we understand it, layers the ILECs' misappropriated "contestability" test onto a route-by-route consideration of self provisioners (which could by itself leave competitors with nothing more than theoretical non-ILEC alternatives). If for any reason, the Commission is inclined to provide the ILECs with this anticompetitive tool to increase uncertainty and eliminate unbundling obligations despite actual impairment (which it shouldn't), the Commission must (1) establish a presumption of impairment, (2) adopt a procedure that would allow the states to analyze route specific facts and apply the inference test.

With respect to broadband issues, the parties emphasized that regulatory relief, at this point in time, should come only on the residential side and only in the very limited context of new fiber deployment all the way to the home. The record in this proceeding is rife with evidence that facilities-based CLECs are introducing small-to-medium sized businesses to broadband for the first time, often via UNEs. Indeed, facilities-based CLEC integrated T1 product offerings (over DS1 loops and EELs) have been one of the biggest success stories of the 1996 Act. Premature deregulation could undercut the ability of facilities-based CLECs to build upon that success and deliver innovative new broadband products to America's small businesses. With respect to proposed broadband relief, the parties also underscored the need for the Commission not to set capacity limits on a location-by-location basis and that the Commission should provide for CLECs' ability to add additional capacity to any capacity-constrained UNEs.

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[7] ***Supplemental Order Clarification***, 15 FCC Rcd 9587, 9598-9600, n. 64 (June 2, 2000).

Pursuant to Section 1.1206 of the Commission's rules, this *ex parte* notification is being submitted to the Office of the Secretary electronically. Please associate this letter with the record in the proceedings indicated above.

Respectfully submitted,

John J. Heitmann

JJH/cpa

cc: Jordan Goldstein
Qualex International